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Utah Supreme Court

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John L. McCoy; Attorney for Defendants-Appellants;

Philip C. Pugsley; Attorney for Plaintiff-Respondent;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

INTERNATIONAL HARVESTER CREDIT
CORPORATION,

Plaintiff-Respondent,

vs.

PIONEER TRACTOR & IMPLEMENT,
INC., WAYNE A. SCHOENFELD
and DORA C. SCHOENFELD,

Defendants-Appellants.

Case No. 16205

APPELLANT'S BRIEF

NATURE OF THE CASE

Plaintiff sued the defendants upon wholesale notes and an open account assigned to plaintiff by International Harvester Company. Defendants denied any balance due alleging various defenses and joined International Harvester Company upon a third party complaint. Defendants appeal from an adverse judgment.

DISPOSITION IN LOWER COURT

The trial Court denied defendant's request for a jury trial, allowed in the record various matters of evidence to which objection was made by counsel, and from said evidence made adverse findings of fact, conclusions of law and a judgment adverse to defendants. A motion to amend the findings, conclusions of law and judgment or in the alternative, for a new trial was denied.

RELIEF SOUGHT ON APPEAL

Defendants seek reduction of the judgment of those items not proved in accordance with the rules of evidence and the law applicable to the facts of this case, or in the alternative, for a new trial on all issues with a jury.

STATEMENT OF FACTS

The plaintiff commenced this action upon a complaint alleging that the plaintiff financed the purchase of parts and equipment upon open account and wholesale notes by the defendant Pioneer Tractor, alleging that credit was given for equipment returned, and that after applying all proper offsets, leaving a balance due of \$27,012.43. Exhibit "B" which was alleged to be an itemization of said balance was merely an invoice from International Harvester Company upon which is handwritten the figures of:

"\$ 21,962.64	Balance account
1,006.86	Jones interest charged back
<u>4,311.81</u>	Balance notes
\$ 27,281.31	Total due
- <u>268.88</u>	Less interest back
<u>\$ 27,012.43"</u>	(R. 155)

Thereafter the defendants filed an answer, and requested that the plaintiff produce all documents, letters, memoranda, notices of sale or any other writings of any nature whatsoever, which plaintiff has in its possession which arose out of the transaction sued upon herein. (R. 131).

Exhibit "C" also attached to the complaint (R. 159) purports to be a demand upon the account made demand for "\$22,700.62 charged on account" together with the alleged balance on notes.

An amended complaint was thereafter filed wherein the plaintiff alleged in addition to the allegations of the original complaint "prior to the commencement of this action, International Harvester Company sold, transferred and assigned to the plaintiff, all of its right, title and interest in and to the notes and the account sued upon." (R. 128). An answer was filed which raised the defense that the complaint failed to state a claim upon which relief can be granted, admitted that the alleged documents were attached to the original complaint, denied that either the plaintiff or International Harvester Company held the notes sued upon, denied any balance due, raised the affirmative defense of unconscionability, unenforceable penalties, lack of notice of sale to establish deficiencies, improper charges, and further, alleged the actual sale of secured property by plaintiff for sums in excess of the amounts credited to defendants. (R. 120).

A third party complaint was filed against International Harvester based upon the failure of International Harvester to advise the defendants that International Harvester Credit Corp. would not include in its floor plan financing the cost of freight along with the invoice price upon new machines. That thereafter, the plaintiff refused to finance the cost of freight on said machines and committed other wrongful acts which caused the financial collapse of Pioneer Tractor (R. 121-122), and further that certain

wrongful acts on behalf of the plaintiff caused termination of the dealership agreement. (R. 122).

On April 14, 1978, the defendants herein tendered payment to the plaintiff of \$6,000.00 plus the sum of approximately \$5,000.00 in a credit reserve account held by plaintiff. (R. 118).

At a pre-trial held April 21, 1978, the plaintiff claimed a balance due of \$27,012.43. (R. 108). On May 24, 1978, a request for jury trial was filed by the defendants and the jury fee tendered. (R. 106). A motion to strike the jury request was made by the plaintiff primarily on the ground that the action was based upon foreclosure. (R. 94-98). This motion was granted. (R. 65).

At the trial the plaintiff, rather than relying upon the exhibits alleged in the amended complaint and attached to the original complaint relied upon Exhibit "1", a dealer sales and service agreement between the defendant Pioneer and International Harvester Company which has an addendum stapled to the back cover and Exhibit "2" which purports to be an agreement between Pioneer and the plaintiff dated February 10, 1976 which has several exhibits attached thereto.

Exhibit "1" is a sales and service agreement between International Harvester Company and Pioneer, and at page 7 first paragraph, covers sales on credit, and in dealing with interest, the contract provides:

"Such notes or contracts shall mature according to the terms in effect at the time of delivery and draw interest at the rate established by the Company and specified therein." (emphasis added)

Stapled to Exhibit "1" is a purported schedule of Discounts and terms. This schedule is not contained in the body of the agreement which makes up Exhibit "1", which was signed by Wayne Schoenfeld as president of Pioneer, but is stapled to the back cover. It is apparent from the staple holes in the rest of Exhibit "1" and the lack of staple holes in the schedule, that the schedule, at one time or another, was not attached to Exhibit "1", because there is a set of staple holes which go through from cover to cover of the original exhibit, but these holes do not go through the schedule. The schedule, on the 4th page thereof provides as follows:

"Interest on floor plan obligations will be assessed monthly. Before and after maturity rates for the ensuing month will be determined in relation to the "prime rate" in effect at four of seven specified New York City banks on the third Monday of the current month." (emphasis added)

Certain minimum and maximum rates are purportedly set by this paragraph.

Based upon Exhibit "1" and "2", Del Homestead, a witness for the plaintiff, testified over objections of plaintiff as to no foundation at pages 216 and 217 that interest upon the total claim was based upon the prime rate and was the sum of \$5,291.09. The writer, searched Exhibit "1" and "2" for a provision as to interest upon the open account, an alleged balance of over \$21,000.00 and to this writer's knowledge, neither of these documents provided for any rate of interest for charges upon the open account.

Further, at page 213, lines 20-30, R. 214, L. 1-26, Mr. Homestead was asked what the balance was upon the open account and

objections made by defense counsel upon the basis of hearsay, not best evidence and no foundation were overruled and the witness testified at L. 1, page 214 that the balance was \$21,694.26. The witness then conceded that \$1,914.07 of this amount was in error (R. 10, L. 8-12, R. 218) thus leaving a balance of \$19,780.19. (R. 218, L. 12-14). These figures were all used by the Court in arriving at the balance owed in the findings of fact and conclusions of law and judgment.

During the time that these amounts were billed to Pioneer the defendant, Wayne Schoenfeld disputed various charges made by International Harvester Company on the account. (R. 219, L. 18-30, R. 220, L. 1-27, R. 383, L. 25-30). International Harvester often sent goods not ordered or sent more goods than were ordered. (R. 303-307, R. 386 L. 5-16, R. 383-386 L. 25-30, R. 408 L. 10-16 R. 401 L. 19-30, R. 402 L. 1-30, R. 403 L. 1-23, R. 386 L. 5-16).

The charges upon the account were not typical open account charges. (Court's own Memorandum Decision, R. 27 & 28).

Exhibit "2" was described by Mr. Homestead as being a document that sets up the financing arrangements between plaintiff and Pioneer for retail financing of agricultural equipment. (R. 178). The dealer's reserve account, was described by this witness as protecting the dealer from astronomical losses. (R. 183). The reserve account for retail contracts on new and used equipment is described in paragraph 8 of Exhibit "E" attached to Exhibit "1" and included therein is a clause which provides that such dealer's reserve account shall be debited with "all losses" paragraph 8:

of Exhibit "E" attached to Exhibit "2", and that after the reserve account has reached \$1,000.00, that losses charged to the Dealer's Reserve Account shall not exceed the credit balance in said account existing at the time of the loss.

It was undisputed that as of December 31, 1976, the Dealer's Reserve Account of Pioneer had a \$5,000.00 balance. (R. 511 and Exhibit "12").

Plaintiff's witness Del Homestead was allowed by the Court to testify orally over objection of defense counsel as to the following losses resulting from retail contracts, which were charged not to the reserve account but the dealer's open account, which charges were included in the balance upon the open account.

a. On a retail installment contract with Myron Jones, a charge of \$2,500.00 was made to Pioneer's open account reversing an alleged credit of \$2,500.00 upon the account and then a charge of \$1,006.86 was also charged as interest upon the retail contract which was not in evidence. (R. 188-190).

b. On a retail contract with Duane Taylor, an alleged dispute by the customer that the finance charge and payments were higher than he the customer had agreed resulted in a charge of \$2,832.46 (R. 191-194), objection was made on the basis of hearsay as to the contentions of the retail customer Jones. (R. 191-193).

c. On a retail contract with William Branch, the customer allegedly withheld \$1,278.35 for an alleged mechanical problem with a used tractor. No contract was in evidence, nor was any testimony other than hearsay evidence to prove any defect or the withholding of funds. (R. 194-196).

d. In the matter of a retail contract of Garth Sweeten, the Court allowed testimony of Mr. Homestead as to the fact that a hitch on a drill was ordered, but was not furnished and without the production of any written contract or without testifying as to whether or not the witness had personal knowledge of this shortage (R. 196-197), Mr. Don Sterrett, sales manager of Pioneer testified that the drills in question were ordered from International Harvester Company with a hitch, but when the drills arrived, the hitch was not included. Pioneer's open account was charged with \$599.03. (R. 343-344).

e. In the matter of Sam Kogianes, evidence of out of Court statements were allowed in to prove that despite a written agreement to the contrary, the customer contended that he was entitled to a different attachment on a combine. (R. 197-200). While the witness contended that Schoenfeld agreed to it, Schoenfeld testified that he only agreed to obtain a different attachment after Homestead threatened to "unwind three (3) contracts" which Kogianes had made, which would have resulted in a loss to the dealership of \$5,000.00 in lost profit. (R. 511-512)

The defendant Pioneer, on the other hand itemized their contentions of the erroneous charges upon the account item by item in Exhibit "12", which was prepared by Mr. Schoenfeld from statements of plaintiff received by Pioneer. (R. 158). Included in this list were the charges from a to c above on retail contract and the \$1,914.07 which plaintiff conceded prior to trial. This list was made available to Mr. Homestead and discussed in a meeting in September of 1977 between Homestead, Critchfield and Schoenfeld.

Also included in Exhibit "12" is a purported charge of "\$10,304.30 in freight which was paid to IH (International Harvester Company) and not refunded in full by 3% deduction claimed by IH." It was the contention of defendants at trial that there was no foundation for such a charge to the open account, that the invoices to support such a charge had never been produced for examination or in Court/and that such a charge bore no reasonable relationship to the expense of International Harvester Company.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ADMITTING
EVIDENCE THAT THE DEFENDANTS OWED
THE PLAINTIFF THE SUM OF \$19,780.19

Plaintiff's witness, Homestead testified over the objections of the defendants upon the grounds of hearsay, no foundation and best evidence, that the books and records of the plaintiff showed that defendants owed to plaintiff the sum of \$1,006.86 for interest charged upon the Myron Jones retail contract and \$21,694.26 which was the balance upon an open account. (R. 211-213). Then Mr. Homestead conceded that \$1,914.07 of these charges were in error. (R.218). The balance arrived at by these figures was the precise figure used in the findings of fact, and judgment entered herein.

The witness then proceeded to enumerate over the objection of defense counsel, certain charges which had been made to the Pioneer account based upon the alleged failure of customers to pay certain retail contracts. Neither the contracts or the records showing payment or non-payment of these contracts were offered or

admitted as evidence.

At the end of plaintiff's case, a motion to strike plaintiff's evidence as being without foundation, not the best evidence and hearsay was taken under advisement by the Court. While this motion was not ruled upon formally, it was apparently denied. No summary of the debits and credits on the open account nor of the items represented by the alleged contracts was made or offered into evidence. Nor was there any evidence offered as to the manner of keeping the books and records of either the plaintiff or its alleged assignor.

The plaintiff, in its argument to the trial Court relied upon the case of State v. Olsen, 287 P 181, 75 U 583 (1930), a criminal case of bank embezzlement where a bank examiner testified orally to a shortage shown upon the books of a bank after a formal audit by the witness. This type of evidence was used in that case solely to show a shortage of dollars, upon the bank books not the reasonableness thereof or whether one person or another was liable for the loss. The case has been followed only in similar cases involving shortages of dollars in this state and has not been cited in this jurisdiction in civil cases where the issues between the parties are whether or not the charges were for goods alleged to be sold and delivered or services alleged to be performed and whether the charges therefor were reasonable or agreed upon.

The line of cases applicable to the case at bar begins with Sprague v. Boyle, 4 U 2d 344, 294 P2d 689 (1956), wherein it was contended by the appellant from an adverse judgment that a

written summary of \$3,295.28 in equipment charges and \$2,289.94 in wages was without foundation and not the best evidence. The Utah Supreme Court held that the schedule was admissable, provided that such a summary of charges must, in order to be admissable be shown to be developed from records, books, or documents, the competency of which has been established and which have been made available for examination by adverse counsel. In that case, the person who prepared the summary testified from first hand knowledge as to how the underlying books were kept and the person had the cancelled checks, invoices and vouchers to support the charges in Court.

In the case of Nalder v. Kellog, 6 U 2d 367, 314 P2d 350 (1957), a case decided one year after Sprague, the Utah Supreme Court ruled that it was reversible error to admit three (3) summaries because some of the figures upon said summaries were not supported by competent evidence.

Subsequently, in the case of Shupe v. Menlove, 18 U 2d 130, 417 P2d 246 (1966), the appellant contended that it was error for the trial Court to exclude such a written summary of charges. This Court ruled that the exclusion was not error, commenting that rejection of such a summary was within the discretion of the trial Court where the appellant was suing upon a construction contract upon a house for costs plus 10% ruling that admission of such a summary was not a matter of right.

A more recent case involving the same type of testimony was Gull Laboratories v. Louis A. Roser Company, No. 15721 filed December 27, 1978, in the Utah Supreme Court, wherein the president

of the plaintiff company testified as to a summary of damages totalling \$65,197.00 that he prepared the summary from the books and records of his company. Over objection by defense counsel that it was not the best evidence, the trial Court admitted the summary. This ruling was held to be reversible error on appeal. This Court cited the Sprague case supra and commented that no foundation was laid as to the cumbersomeness or unavailability of the records, nor was there any testimony as to how the original records were made, ie., accounting procedures or regularity of making entries. The Court also noted that there was a refusal to produce the original records.

The proper rule is stated in B. Jones, Evidence (5th Ed. 1958) p. 473.

§244--Summaries of Multiple Writings.--

Another exception to the best evidence rule, based on necessity, arises when the primary source of proof consists of numerous documents which cannot be conveniently examined in Court, and the fact to be proved can only be ascertained by an examination of the whole collection. It is well established that in such a case a summary * * * may be given in evidence by any person who has examined the documents and who is skilled in such matters, provided the result is capable of being ascertained by calculation.* * *

To the application of this rule, it is essential that the original records or writings be first duly identified and that a sufficient foundation be laid so as to entitle the records or writings themselves to be admitted in evidence. Also, the admissibility of the records themselves as evidence must be established, and they must be available to the opposite party for cross-examination. (emphasis added)

Rule 63 (13) of the Utah Rules of Evidence provides the following exception to the hearsay rule:

"Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein if the judge finds that they were made in the

regular course of business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstance of their preparation were such as to indicate their trustworthiness."

The dealership of Pioneer was closed out in the three (3) weeks following August 6, 1975. Presumably, the books and records of the plaintiff should reflect such a closeout and the various charges which make up the balance sought; yet Exhibit "26" which is a statement prepared by plaintiff on the open account dated April 20, 1977, almost eight (8) months afterwards, shows a balance of \$14,714.35, only 67% of the balance which the plaintiff ultimately contended was due upon the open account. Such books or records cannot be said to be made at or about the time of the act, condition or event recorded.

As a part of the alleged amount due upon the open account, there was a charge for \$10,304.60 to the open account, (Exhibit 12, top of 2nd page) which was claimed by International Harvester as a "3% penalty" (Exhibit 27 shows one such charge) which was assessed upon an alleged amount of \$306,000.00 worth of equipment that the plaintiff allegedly took back into its possession. (R. 269-270). None of the credit invoices representing the various pieces of machinery handled in this way were in the possession of the witness Critchfield nor did he produce them for counsel for plaintiff. (R. 281-282).

International Harvester Company and the plaintiff are separate corporations. (R. 221 L. 1). Mr. Homestead, an employee of the plaintiff never testified about how the charges originated, what the books original entries were, or who kept them or in what manner they were kept on behalf of the plaintiff. Nor did he

testify as to how any of these matters were accomplished on the part of International Harvester Company; nor did he testify as to what charges originated with the plaintiff and what charges were originated through International Harvester, also there was no competent evidence that the open account charges of International Harvester Company were in fact assigned to plaintiff.

The trial Court never made any finding as to the books and records of International Harvester or the plaintiff and the way they were kept, but if such a finding were made, it could not be that the entries were made at or about the time of the act, condition or event recorded as required by Rule 63 (13) URE cited above. If such a finding were made, it would be directly opposite to the requirement of Rule 63 (13) URE. Such a rule has been the law of evidence in this state for sixty-five years. In the case of Utah Commercial Savings Bank v. Fox, 44 U 323, 140 P 660 (1914), this Court in reversing a judgment and remanding made the following comment regarding certain book entries which were admitted by the trial Court to show the purpose of a note:

"Even the entries in the books that were produced have little, if any, probative force, since in most instances they were made neither by the person who knew the actual facts recorded, nor were the entries made at the time the transactions occurred, but were made a long time after the transactions had taken place. Nor are the book entries such as clearly explain themselves, so that one may say they can be implicitly relied on as tending to establish a particular fact or facts. Indeed, under the ordinary rules of evidence, those entries would practically be of no probative force or effect whatever."

The plaintiff in the subject case did not produce a summary of the items which made up the total balance, which takes this case even one step beyond the Sprague, Shupe, Nalder or Gull.

cases, supra. Such a ruling totally destroys the hornbook rule of law that requires a plaintiff to prove its case by a preponderance of the evidence. Also, such a rule virtually leaves a dealer or customer at the mercy of the billing department of the seller where the seller bills the customer for various items, some of them erroneous, and the customer protests the erroneous items and the billing department has the written records showing the manner in which orders for the erroneous items were originated. In a suit between the seller and the buyer, before the seller can be given a judgment it should be the seller's burden to show whether or not orders for the items were in fact made, and if so, whether there was an agreed upon price or whether the price was reasonable.

The total inappropriateness of the application of a rule of evidence which allows evidence three (3) or four (4) times removed from the actual source to be admitted is easily seen when it is considered that \$1,914.07 or almost 10% of the account balance sued upon was conceded by the plaintiff as being erroneous only on the day of the trial and further, when the errors which consistently cropped up, are considered, the trustworthiness of the books of the plaintiff is seen to be very poor.

a. Pioneer ordered \$300.00 to \$400.00 worth of nuts and bolts resulting in over \$5,000.00 worth of nuts and bolts being shipped and Pioneer's account was charged with those items. It took numerous demands and seven months for IHCC to remove this charge from the account. (R. 304).

b. IHCC charged defendant's open account with \$6,000.00 worth of tools which were to go on a note, it took

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numerous demands and several months to remove this charge from the account. (R. 304).

c. International Harvester Company shipped to Pioneer \$4,000.00 worth of obsolete parts which Pioneer did not order and which did not fit any machinery which Pioneer had in stock. These parts were still in the inventory at the close out of the dealership. Pioneer only received \$2,000.00 credit for them. (R.401-403).

d. International Harvester Company shipped to Pioneer seven (7) boxes of service binders not ordered, Pioneer never received credit for these binders. (R. 386).

POINT II

THE COURT ERRED IN ADMITTING ORAL
EVIDENCE THAT PIONEER OWED THE
PLAINTIFF \$4,311.81 ON NOTES

Plaintiff's witness, Homestead testified over the objection of defense counsel as to no foundation, hearsay and not the best evidence that defendants owed plaintiff the sum of \$4,311.81 upon wholesale notes. (R. 211-213). The notes were never admitted into evidence, never produced for examination of counsel and the execution thereof was denied by defendants.

The general rule is found at Bills and Notes, 12 Am Jur 2nd p. 333 § 1299:

"As a general rule, at least, there can be no recovery on an alleged bill or note which is not introduced in evidence if its absence is not explained as a foundation for proof of its contents
See also 11 CJS Bills & Notes § 682

In searching the Utah cases on this point, there are cases which hold that where the promissor admits execution of the notes, that it is not necessary to produce the original docu-

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ment, Albergo v. Gigliotti, 96 U 170, 85 P2d 107 (1938). However, where there is an issue as to the execution and existence of the note, it is a proper rule that the original be produced and marked "reduced to judgment." Utah Commercial Savings Bank v. Fox, 44 U 323, 140 P 660 (1914). In this matter, the amended complaint did not allege the execution and delivery of the notes, but merely alleged a balance due which was denied in the answer of defendants and again in the opening statement of defendants counsel, again in a motion to dismiss and again in a Rule 59 motion. The testimony of plaintiff's witness was admitted over the objection of defense counsel, which was error. The sum of \$4,311.85 was used to arrive at the amount of the judgment and this sum should be deducted therefrom.

POINT III

THE TRIAL COURT CHARGED THE DEFENDANT
WITH RETAIL CONTRACT LOSSES CONTRARY
TO THE PROVISIONS OF A CONTRACT WHICH
WAS DRAFTED BY THE PLAINTIFF

Exhibit "2" was described by Del Homestead at (R. 178 L. 2) as being a document that sets up the financing arrangements between International Harvester Credit Corporation and Pioneer Tractor and Implement for retail financing of agricultural equipment. This document is on a printed form bearing the logo of plaintiff in the upper right hand corner.

Exhibit "E" attached to Exhibit "2" provided as follows:

"B. DEALER AGREES AS TO EACH RETAIL CONTRACT ACCEPTED BY IHCC:

1. That the down payment and terms of sale shall be in compliance with IHCC's authorized terms in effect at the time such Retail Contract is submitted for acceptance by IHCC.

2. That he warrants that:

- (a) The Retail Contract will be valid and free from defenses, offsets, or counterclaims;
- (b) the Retail Contract will constitute a first lien in favor of IHCC upon the goods for which it will have been given, and it will have been filed or recorded according to law to preserve the priority of such lien;
- (c) all statements contained therein and in the purchaser's statement will be true and complete;
- (d) No part of the down payment or of any installment will have been advanced, directly or indirectly, by him to the user;
- (e) on the date of the assignment or endorsement to IHCC the goods will have been delivered; and
- (f) the transaction represented by the Retail Contract was an actual bona fide sale in the usual course of business.

3. Upon request by IHCC, to purchase from it for cash for the unpaid balance thereof, plus IHCC's expenses, less unearned finance charges, and less credits to the Dealer's reserve account, provided for in Section A-2 (a) hereof, any Retail Contract if he has breached any warranty or agreement with respect thereto contained in this Arrangement. No formal tender of any Retail Contract for purchase by Dealer shall be required.

4. Upon the request of IHCC to render, without charge, assistance in its collection or in repossession of goods covered by Retail Contracts, and upon repossession, to store and care for such goods, subject to IHCC's order, all without cost to IHCC. Also, upon request of IHCC, and upon being furnished by IHCC with such replacement parts as may be necessary, to recondition the repossessed goods. In such cases, Dealer's established customer rates for labor shall be paid by IHCC.

5. That he hereby waives presentment, protest, and all demands or notice as to each Retail Contract, and consents to any extensions of time or compromise with any persons without affecting his liability. (emphasis added)

6. That he hereby authorizes IHCC, at its option, to pay to IH to be applied to his obligations, all or any part of any amounts which he might otherwise be entitled to receive in cash from IHCC under this Arrangement....

and at paragraph 8 thereof:

8. As security for, and not in lieu of, performance by Dealer of all obligations of this arrangement, to the establishment of a special reserve account in Dealer's name, herein referred to as "Dealer's Reserve Account."

(a) such dealer's reserve account:...

(iv) Subject to the reservation of 8(c) below, shall be debited all losses, including those of-
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pocket, reconditioning and reselling expense, sustained by IHCC on any such Retail Contract accepted under this Arrangement. With respect to this provision, IHCC may at its option, on or before January 1 of each year debit Dealer's Reserve Account for anticipated losses on repossessed goods, covered by Retail Contracts accepted under this Arrangement, which are on hand and unsold. Debits for such anticipated losses shall be for the purpose of adjusting IHCC's investment in the repossessed goods to the actual appraised resale value...

(b) If at any time a loss occurs, arising from Retail Contracts purchased from the Dealer and not fully guaranteed by him, and the Reserve Account credit balance is insufficient to cover the loss, then Dealer will pay to IHCC in cash an amount which when added to such credit balance will be equal to the loss or \$1,000.00 whichever is the lesser. However, the Dealer shall be under no obligation to pay any such cash amounts after (i) the Reserve Account has reached its initial \$1,000.00 of credit balance, or (ii) the Dealer has paid in cash \$1,000.00 for losses pursuant to this subparagraph (b), or (iii) credit to the Reserve Account plus amounts paid by the Dealer under this subparagraph (b) initially reach an amount equal to \$1,000.00.

(c) After Dealer has been relieved of liability to pay losses in cash as provided for in (b) above, losses charged thereafter to the Dealer's Reserve Account shall not exceed the credit balance existing in the Dealer's Reserve Account at the time of loss.

It was undisputed that the reserve account of the dealer, Pioneer had a credit balance of \$5,000.00 (R. 511 and Exhibit "12") as of December 31, 1976 and that the purpose of the reserve account is to protect the dealer from astronomical losses and also to protect International Harvester Credit Corporation. (R. 183).

The following charges were for losses allegedly sustained by the plaintiff as a result of retail contracts upon new agricultural equipment.

a. Myron Jones: In May of 1976, Pioneer sold a tractor upon a retail contract and it was financed by the plaintiff upon a retail contract (R. 188) as a result of this the plaintiff charged \$2,800.00 to the open account which was objected to on grounds of

foundation. (R. 188). An interest charge of \$1,006.00 was also made to the open account upon this same transaction.

b. Duane Taylor: The plaintiff charged defendants account with \$2,832.46 because the customer contended that he owed something different than the sum stated in the retail contract and the retail contract was not in evidence. (R. 195).

c. A charge of \$1,278.35 on a retail contract of William Branch was made to the finance reserve account of Pioneer which, if properly proved would have been proper. However, the plaintiff is inconsistent in the treatment of this loss on a retail contract. All losses upon retail contracts should have been so treated.

d. A charge of \$599.03 for a hitch upon a drill for retail customer, Garth Sweeten which the defendant contended was ordered with the drills from International Harvester and not delivered. (R. 343). The plaintiff claimed that it had to furnish such a hitch.

e. A charge of \$431.63 based upon a contention of retail customer Sam Kogianes that his combine should have had a different attachment upon his combine than his agreement provided.

The foregoing losses, exclusive of the Branch contract, which was charged to the reserve account rather than the open account, amount to \$7,669.12, and were included in the findings of fact and the judgment amount.

Nowhere in Exhibits "1" or "2" is there an attempt at the definition of what would be termed a "loss" under a retail contract, but the use of the terms "all losses" sustained by IHCC

on any retail contract in paragraph 8(a) (iv) would certainly indicate to any person reading it that the company (IHCC), when it used that term meant it to mean just that - all losses. However, when the company applied the agreement to the facts here, it refused to apply paragraph 8, according to its terms, and charged all losses on retail contacts of equipment to the open account. When questioned about this at pages 237-239, plaintiff's witness Homestead indicated that the company only charged the reserve account when there was a repossession, preferring to hold the dealer's reserve account without interest and charge the dealer's open account with such losses, as claiming that such non-repossession losses came under the provisions of paragraph B instead. Paragraph 8 does not use the term "only repossession losses" or even use the term "repossession", or make any distinction or modification of what it means by the term "all losses."

Assuming for the purpose of argument that some breach of the provisions of paragraph B (2) was proved by competent evidence in the Court below, it is apparent that there is a conflict between the provision of paragraph B (3) (5) and paragraph C (8). However, viewed in their proper perspective, it is apparent that the provisions of paragraph C 8 (b) and (c) were intended to 'protect the dealer from astronomical losses' upon retail contracts. See Homestead's testimony at (R. 183).

It was plaintiff's contention at trial that the following words in Exhibit 2 E allowed plaintiff to make compromises with retail customers and charge them to the dealer's account:

"B. Dealer agrees as to each Retail Contract accepted by

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IHCC:

5. That he hereby waives presentment, protest, and all demands or notice as to each Retail Contract, and consents to any extension of time or compromise with any persons, without affecting his liability."

The sole word out of all of the exhibits that purportedly gives the plaintiff authority to charge Pioneer's account with the above retail losses is the word "compromise." None of the documents specify just what item or items the dealer purportedly consents in advance to "compromise" or in what manner such compromise is to be accomplished. The word "compromise" is used in the agreement in the same phrase as consenting to extensions of time and therefore, could be construed as consenting to compromise as to the time an obligation is to be paid. Also, the word compromise is followed by "without affecting his liability." Does this mean that the dealer only consents to a compromise without affecting the dealers liability? If so, then it could be inferred that the dealer's liability could not be increased by the compromise; as to do so would certainly "affect" the dealer's liability. It is submitted that such a brief phrase having so many possible interpretations could not and should not be construed to cost a dealer several thousand dollars at the whim of the holder thereof.

In any event, to use such a phrase to charge losses upon retail contracts to the dealers open account is contrary to the plain intent of the language in paragraph 8(a) (iv), 8(b) and 8(c), cited above and is a direct contradiction to the well recognized rule of law in this and other jurisdictions that documents drafted by a party will be strictly construed against that

party. Guinand v. Walton, 22 U 2d 196, 450 P2d 467 (1969), also at 25 U 2d 253, 480 P2d 137 (1971), Seal v. Tayco, 16 U 2d 323, 400 P2d 503 (1963), Christopher v. Larson Ford, 557 P2d 1009, (1976), () Skousen v. Smith, 27 U 2nd 169, 493 P2d 1003 (1972). Bank of Ephraim v. Davis, _____ U 2d _____ 559 P2d 538 (1977). The Seal case is particularly applicable to the instant case. A distributor of brake shoes sued a dealer and the dealer counterclaimed, based upon delay by the distributor. The distributor claimed that the words "In no event shall seller be liable for special or consequential damages," which comprised the last sentence in a paragraph, gave the distributor a blanket protection against any claim, while the dealer claimed that such language was limited to the causes which immediately preceded this sentence.

This Court ruled for the dealer, commenting:

"...it seems manifestly unfair to permit one who formulates a contract to so fashion it as to mislead the other party by setting forth a clearly apparent promise or representation in order to induce acceptance, and then designedly "burying" elsewhere in the document, in fine print, provisions which purport to limit or take away the promise, and/or preclude recovery for failure to fulfill it."

The testimony of Wayne Schoenfeld was that Homestead told him that the losses on retail contracts would be limited to \$1,000.00 charged to the reserve account, (R. 399-401), but such oral testimony was stricken by the Court.

In the instant case, as in Seal, a party should not have the benefit of drafting an instrument with conflicting provisions in it make representations as to its benefits and then have it

construed in such a way as to maximize his benefits in the event of a dispute, thus the charges of \$7,669.12 should be deducted from the open account and charged to the dealer's reserve account in accordance with the terms of plaintiff's own agreement.

POINT IV

THE TRIAL COURT ERRED IN RECEIVING
EVIDENCE OF MONEY TRANSACTIONS
BETWEEN PLAINTIFF AND INTERNATIONAL
HARVESTER COMPANY TO SUPPORT A 3%
HANDLING CHARGE, WHICH WAS IN FACT
A PENALTY

The Court received testimony from Noel Critchfield as to a purported telephone bill of \$450 (R. 288), a charge of \$13,800.00 as interest charged by the plaintiff to International Harvester for inventory returned from Pioneer (R. 272) and \$2,300.00 as a service charge (R. 274) over the objections of defense counsel as being without foundation and not the best evidence. These items were presented to the Court for the purpose of showing that a 3% handling charge was not a penalty and bore no relationship to the out-of-pocket expenses incurred by International Harvester Company in the close-out of the dealership.

Other than the telephone bill, the witness was not asked if he had personal knowledge of any of the charges to which he testified. No business records or other documents were offered or admitted to show any of said charges, nor was there any evidence oral or written, that a cause of action for any of said amounts was assigned to plaintiff.

In answers to interrogatories, as to the question of out-of-pocket costs incurred, the plaintiff at (R. 75-92) only

specified the figure of \$3,147.81 with \$670.00 of that answer being an estimate only. As to International Harvester Company, employees, there was an expenditure of approximately \$2,000.00 in out-of-pocket expenses including an amount which was estimated (R. 287-288). An objections was made to the amount which was estimated on the basis of no foundation (R. 288). As to the charges between International Harvester Company and the plaintiff, the witness Critchfield admitted that he didn't have the documents supporting their transactions and said documents had never been made available to counsel for plaintiff (R. 281-283). At findings of fact No. 7 (R. 23), such evidence was referred to in the finding of the Court that "evidence was presented showing substantial costs to International Harvester" as a result of repurchase of the equipment. Such evidence, other than the evidence and documents produced at (R. 75-92) should have been excluded on the basis of best evidence, hearsay and no foundation in accordance with defendant's objections and motion to strike at the end of plaintiff's case. (R. 288).

Plaintiff's witness Homestead testified that of the persons who were listed upon the supplemental answers to interrogatories, the following employees were employed by International Harvester Company. (R. 235-236):

N.R. Critchfield	\$ 784.33
W. Enright	193.51
F.L. Jacobsen	208.57
R.D. Coffman	137.16
	<u>\$1,313.57</u>

The salaries of these employees were incurred by International Harvester Company regardless of whether they participated in the close-out of Pioneer. (R. 236). The total charges incurred by International Harvester Company actually proved by any competent evidence was the sum of \$1,313.57 in out-of-pocket costs. The remainder of any alleged expenses should have been excluded upon the basis of no foundation and hearsay for the same reasons and under the same cases as cited in subsection I above.

POINT V

THE TRIAL COURT ERRED IN FINDING THAT
THE 3% PENALTY CHARGE BORE A REASONABLE
RELATIONSHIP TO THE COSTS AND EXPENSES
ACTUALLY INCURRED BY INTERNATIONAL
HARVESTER COMPANY

The 3% handling charge referred to as a penalty on invoices of International Harvester Company is referred to at paragraph 29 of Exhibit "1", the parties to which are International Harvester Corporation in closing out the dealership are shown in the supplemental answers to interrogatories and as testified to by Del Homestead are shown as the expenses of Noel Critchfield - \$784.33, W. Enwright - \$193.51, F.L. Jacobson - \$208.57, and R.D. Coffman - \$137.16, which totals \$1,323.57. Otherwise, the freight and handling of the equipment was accomplished by Pioneer Tractor or other dealers. While Mr. Homestead testified to other expenses, these were expenses of International Harvester Credit Company, not International Harvester Company, the party to the contract. The plaintiff cannot claim these expenses because they were not parties to the contract, nor have they been competently proven.

clause in the event of breach, but only in an amount which is reasonable in the light of the anticipated or actual harm caused by the breach."

It is submitted that \$1,323.57 does not bear a reasonable relationship to the sum of \$10,364.30, even if said figure was competently proved. The sum of \$10,364.30 is almost eight (8) times the actual expenses incurred by International Harvester Corporation as a result of the termination of the dealership. Such a windfall has been uniformly held to be a penalty and not enforceable. See Perkins v. Spencer, 112 U 468, 243 P2d 446 (1952). Such a policy has been applied to sales of merchandise, Western Macaroni v. Fiore, 47 U 108, 151 P 984 (1915). Also see Restatements of Contracts § 339.

The Western Macaroni case contained the following rule:

"When the question of whether a contract provides a penalty or liquidated damages is in doubt, the contract ordinarily will be regarded as providing a penalty. If the stipulation is a penalty, it, as such, will not be enforced, but simply the actual amount of damages sustained if less than the amount of the penalty."

In the Western Macaroni case, the Court upheld a lower Court ruling that a \$500.00 liquidated damage amount was a penalty where the actual damages suffered was \$80.00, a case in which the liquidated amount was about six (6) times the damages actually incurred.

The Western Macaroni case was cited favorably in the Perkins case supra and has not been overturned or modified by any decision since that time. (See discussion of cases in Perkins). Since the Perkins case, this Court decided the case of Johnson v.

Carman, ____ U ____, 572 P2d 371 (1977) where this language was used in upholding a trial Court decision:

"Although we do not purport to lay down any specific percentage which will be considered unconscionable, to allow seller to retain the \$34,596.10 paid by buyer when seller's actual damages amount to only \$25,650.00 would be "grossly excessive and disproportionate to any loss." Such would be to allow seller to retain payments totalling some 34% greater than the actual damages determined by the trial Court."

The situation as to the actual damages the plaintiff or its assignor may or may not have sustained in reselling said equipment is rather obscure, as the defendants requested the resale price of the equipment in interrogatories, which information was never provided by the plaintiff. (See p. 165). When plaintiff's witness Homestead was asked why such information was never provided, the witness said:

"No, it has not, because the equipment was taken back in accordance with the sales and service agreement." (R. 241)

When asked what steps he had taken to verify where the information was, the witness replied at (R. 242 L. 2):

"I have not taken it upon myself to contact the Kansas City office to try and institute a search for these records unless it's absolutely necessary because of the costs involved."

It is apparent from the foregoing that the plaintiff does not deem its loss in this regard significant enough to search out the records necessary to prove its case. Perhaps the reason is that the plaintiff did not incur the loss.

It is submitted that under all of the facts and circumstances, that plaintiff should not be allowed to reap a windfall of approximately \$9,000.00 at the expense of defendants.

POINT VI

IT WAS ERROR FOR THE COURT TO REFUSE
TO ALLOW AN AMENDMENT PURSUANT TO RULE
15(b) URCP TO SHOW SUBSEQUENT AGREEMENT
THAT NO LIABILITY BEYOND THE APPLICATION
OF ASSETS OF PIONEER TO THE DEBT TO IHCC
WOULD BE CHARGED

Exhibit No. 25 is a two (2) part document, the first
page of which is a paper in the handwiring of Wayne Schoenfeld
captioned:

"WE OWE TO HARVESTER"

Lawn Mower -----	\$	200.00
Combine -----		22,381.00
Monater (sic) -----		363.95
Steiger -----		17,500.00
Check -----		3,800.0-
		<u>\$ 44,044.95</u>

		<u>TRADES</u>	
Freight -----	\$21,881.11	TD 9 Cat -----	\$ 4500.00
Purc. Lawn Equip. -----	1,000.00	D 6 Cat -----	9000.00
Warranty AG -----	4,165.66	Red Truck -----	6500.00
Warranty Truck -----	1,208.80	Drills (2) -----	3000.00
Parts -----	6,000.00	2 Used MC Drill -	1000.00
Equipment -----	<u>25,500.00</u>	A tractor -----	900.00
		H tractor -----	<u>600.00</u>
	\$59,755.57		\$25,500.00"

The second page is a security agreement prepared by Del
Homestead on behalf of International Harvester Credit which pro-
vides as follows:

"For good and valuable consideration, the receipt
of which is hereby acknowledged, the undersigned Pioneer
Tractor and Implement Inc., (X) Corporation located or
residing at Spanish Fork, Utah (hereinafter called Debtor),
for the purpose of additionally securing payment of a
certain contract(s), note(s), security agreement(s) or
account(s) (hereinafter individually and collectively
called contract) entered into by and between the debtor
and International Harvester Company dated _____, 19____,
and on which Debtor is presently indebted to International
Harvester Credit Corp. (hereinafter called Secured Party),
as seller or seller's assignee, in the total amount of
\$44,322.00, payable in installments as follows:..."

Homestead took possession of the original of Exhibit No. 25.

Mr. Don Sterret, general sales manager of Pioneer testified that he, Schoenfeld and Critchfield had a meeting and he and Schoenfeld were told what to expect in the close-out of the dealership a day or two after the resignation of Pioneer. The assets and what was owed would pretty much handle themselves and Homestead and Critchfield concurred.

Mr. Noel Critchfield testified that he and Del Homestead, prior to the meeting with Schoenfeld had discussed the figures contained on Exhibit No. 25 and had agreed to those figures. (R. 549-551).

Mr. Pugsley at p. 550 asked the following question:

"With respect to Exhibit 25 which has been shown to you, did you ever agree to those figures in the meeting that has been referred to?

I believe Del Wrote these figures up, and when he went over them with me I was agreeable with them, yes.

Do you know that this is Mr. Homestead's writing?

Not exactly, I don't; but we, Del and I discussed these things prior to our meeting with."

A motion was made by defendants at the close of evidence to amend the answer of defendants to conform to the evidence that the agents of the plaintiff and International Harvester Company had made a novation and waived the 3% handling charge. (R. 551). While the motion was taken under advisement, it apparently was denied.

Rule 15(b) URCP provides as follows:

"(b) AMENDMENTS TO CONFORM TO THE EVIDENCE:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not to be amended when the presentation of the merits of the action will be subverted thereby and the objecting party fails to satisfy the Court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The Court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence."

When an issue as to a second agreement has been tried with the implied consent of the parties, it is error for the trial Court not to grant a motion made pursuant to Rule 15(b) URCP. Cheney v. Rucker, 14 U 2nd 205, 381 P2d 86 (1963). Parties to a written agreement may, by their subsequent action modify such agreements notwithstanding provisions to the contrary in the first agreement. Dillman v. Massey-Ferguson, Inc., 13 U 2d 142, (1962) 369 P2d 296, Calhoun v. Universal Credit, 106 U 166, 146 P2d 284 (1944), Davis v. Payne, 10 U 2d 53, 348 P2d 337.

The motion by defendant to amend should have been granted, and the Court should have found that the parties by their actions formed a new agreement and waived the 3% handling charge.

POINT VII

THE COURT ERRED IN AWARDING INTEREST IN
THE SUM OF \$5,291.09.

Plaintiff's witness Homestead testified over the objection of defendant's counsel that his calculations showed that the plaintiff was entitled to the sum of \$5,219.09 as interest. This

was upon the total amount of \$25,098.36, which was comprised of \$4,311.81 upon wholesale notes and \$19,780.19 upon the open account. There was no testimony as to when the interest began to accrue or what rate was used in this computation, other than that it was based upon the prime rate of three (3) New York banks which were never named by the witness.

Exhibit "1" provides at page 7 first paragraph "Such notes or contracts shall mature according to the terms in effect at the time of delivery and draw interest at the rate established by the Company and specified therein. The word "therein" refers to the notes or contracts. No notes or contracts other than Exhibit "2" were entered into evidence. There is a Schedule of terms stapled to the back cover of Exhibit "1", after the signature of Pioneer, which schedule bears only one staple, while Exhibit "1" to which said schedule is attached bears two staple holes which go from the front cover through the back cover, but does not go through the schedule attached inside the back cover, showing that the schedule was not always attached to Exhibit "1".

This schedule at page 4 has a clause which provides that interest owed on floor plan obligations will be due monthly and determined at 3-1/2% over the prime rate after maturity and 1-1/2% over prime rate before maturity. There is no mention in this exhibit of the interest rate to be charged upon retail contracts or upon the open account. It is impossible to tell from the evidence what if any part of the sums claimed by the plaintiff were floor plan obligations, and which items were not floor plan obligations. In any event, the latter clause is in conflict with

the first provision at page 7, first paragraph of Exhibit "1" which is a printed form, bearing the logo of International Harvester Company and was drawn by plaintiff's alleged assignor. In the event of a conflict or vagueness in terms of such a document, the document should be construed against the drawer. See the Guinand, Seal and Bank of Ephriam cases supra.

There were no notes or contracts in evidence from which a rate can be established pursuant to the first paragraph of page 7 of Exhibit "1". Without a written document providing for a different rate of interest signed by the party to be charged.

The only rate of interest which would be applicable would be the statutory rate of 6% as provided in 15-1-1 (U.C.A. 1953 as amended). Which section provides as follows:

"Legal Rate-The legal rate of interest for the loan or forbearance of any money, goods or things in action shall be six per cent per annum. But nothing herein contained shall be so construed as to in any way affect any penalty or interest charge which by law applies to delinquent or other taxes or to any contract or obligations made before the 14th day of May, 1907."

Are the charges upon which plaintiff is suing a loan or forbearance of any money, goods or things in action?

In particular, a purported charge for \$10,304.30 made in the close-out of the dealership upon defendants' open account, was based upon 3% of an alleged amount of inventory that was returned to International Harvester at the expense of Pioneer. There was no evidence to prove this charge presented to the Court. There was no evidence that as a result of said charge, the defendant Pioneer received any "loan or forbearance of any money, goods or things in action." There are no cases in Utah which interpret this part of the foregoing statute. It is

submitted however, that it was not the intent of the drafter of such a statute to charge a 6% per annum charge in addition to a 3% charge upon an amount that is unverifiable until judgment.

This Court has consistently held, however, that in order to assess interest, the time of the loss or damage must be ascertained and the interest capable of being mathematically computed from the evidence. Fell v. Union Pacific Corporation, 32 U 101, 88 P 1003 (1907); Uinta Pipeline Corporation v. White Superior Co., ___ U 2d ___, 546 P2d 885 (1976); Anderson v. State Farm Fire & Cas. Co., _____ U2d ___, 583 P2d 101 (1978).

Nowhere in the evidence did the plaintiff establish the date or dates upon which the various and sundry charges they claim came into being. Without such information, a total amount of interest cannot be calculated. The sum of \$5,291.09 as interest should be deducted from the findings.

POINT VIII

IT WAS ERROR FOR THE TRIAL COURT TO
DENY THE DEFENDANTS A TRIAL BY JURY

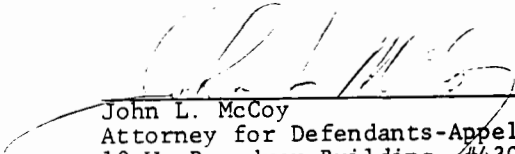
This Court, in reviewing the record/^{can} make mathematical deductions from the findings of fact and conclusions of law as it deems proper/ (see the Seal case, supra) If this is truly a case in equity, as the plaintiff insisted in a motion to strike the jury demand, then this Court has the prerogative and the right to weigh the evidence and decide questions of fact relating thereto. See Christopher v. Larson Ford (supra). On the other hand, if in fact this is a case at law, then the defendants have a right to have the issues decided by a jury. See Valley Mortuary v. Fairbanks, 119 U 204.

225 P2d 739 (1950). This action was not a foreclosure of a mortgage or for other equitable relief, but a suit upon notes and an account and a guaranty with issues having equitable aspects in which there were underlying factual issues upon which a jury could have acted in an advisory capacity both on the main case and the third party complaint. If this court does remand this case for a new trial, then a direction should be made to try the case before a jury.

CONCLUSION

In conclusion, the findings and judgment of the trial Court are based upon testimony that was not the best evidence, hearsay evidence and information having no foundation. It was error for the trial Court to deny defendant's motion to dismiss, motion to amend the findings and judgment or in the alternative for a new trial. This Court should either remand this case with instructions to make findings in accordance with the actual, competent evidence adduced at the trial, or to remand this case for a new trial upon all issues in the claim and third party claim by a jury.

Respectfully submitted this 13th day of April, 1979.



John L. McCoy
Attorney for Defendants-Appellants
10 W. Broadway Building, #430
Salt Lake City, Utah 84101

MAILING CERTIFICATE

I hereby certify that I delivered twelve (12) of the foregoing Briefs to the Utah Supreme Court, State of Utah, this 13th day of April, 1979, and further that I mailed a copy of the foregoing Brief to Philip Pugsley, attorney for plaintiff-respondent, at 310 South Main Street, Salt Lake City, Utah, postage prepaid.